

Judge

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JOHN RICHARD JAE,  
Plaintiff,

vs.

G.O. LESTER,  
Defendant.

Civil No. 1:CV-01-004

(U.S. District Judge Rambo  
(Magistrate Judge Smyser)

**FILED**  
**HARRISBURG**

AUG 27 2001

MARY E. D'ANDREA, CLERK

Per 518  
DEPUTY CLERK

PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANT'S MOTION FOR  
STAY OF PROCEEDINGS AND ENLARGEMENT OF TIME TO RESPOND TO  
PETITIONER'S PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW, the Plaintiff & his Counsel in the above-captioned Civil  
Action, John Richard Jae, as a Layman Unlettered in the Arts & Sciences of the Law,  
Proceedures within the United States, pursuant to M.D. LR 2-6, & now files  
Plaintiff's Brief in Opposition to Defendant's Motion for Stay of Proceedings  
Enlargement of Time to Respond to PETITIONER'S PETITION FOR WRIT OF  
Habeas Corpus, herein, & who, avers, deposes & states:

**I. RELEVANT PROCEDURAL HISTORY**

On or about January 1, 2001, Plaintiff John Richard Jae, a Pennsylvania  
State Prisoner, commenced this above-captioned Civil Rights Action  
to 42 U.S.C. § 1983 by filing a Complaint, along with an Application for Leave to Proceed  
Pauperis. On January 25, 2001, this Court granted Plaintiff's Request to Proceed  
Pauperis. On or about March 27, 2001, Defendant C.O. Lester, by Counsel,  
his Motion to Revoke Plaintiff's In Forma Pauperis status and stay  
Proceedings. Defendant's Brief in support of such Motion was filed  
on or about April 10, 2001. On or about April 23, 2001, the Plaintiff  
Motion for Enlargement of Time to file his Brief in Opposition to defendant's  
motion to revoke plaintiff's in forma pauperis status and stay of proceedings  
which this Court granted on April 27, 2001. On or about June 28, 2001, Plaintiff  
again filed a Motion for Enlargement of Time to file such Brief in Opposition.

filed his Petition For Writ Of Mandamus And Brief In Support, here asking this Court to order Sgt. Greene Room Officials to return all his legal materials, Court Case Files/papers & his own personal law books to him here, and that they are to provide this Plaintiff with enough paper & carbon paper so that he can prepare & file his legal pleading/brief in opposition to case & that they are to provide this Plaintiff with two (2) legal envelopes to mail brief to this Court & to counsel for the Defendant, herein this case. The Plaintiff attached a Certificate of Service to the Petition/Brief, affirming that he served counsel for the Defendant with a true & correct carbon copy thereof the same, by way of U.S. 1st class Mail, Postage prepaid on June 22, 2001.

On August 6, 2001, U.S. Magistrate Judge J. Andrew Smyser, of this Court, an Order in this case, ordering that:

AND NOW, this 6th day of August, 2001, IT IS HEREBY ORDERED that on or before August 14, 2001, the defendant shall either file a brief in opposition to the plaintiff's petition for writ of mandamus (doc. 19) or file a statement indicating that they do not oppose the petition.

On August 16, 2001, Defendant, by counsel, filed his Motion For Stay Of Proceedings And Enlargement Of Time To Respond To Plaintiff's Petition For Writ Of Mandamus, herein this case.

THIS is the Plaintiff's Brief In Opposition To Defendant's Motion For Stay Of Proceedings And Enlargement Of Time To Respond To Plaintiff's Petition For Writ Of Mandamus.

## II. STATEMENT OF THE FACTS

Plaintiff alleged that on August 23, 2000, Defendant Co. Lester threatened to assault him (Complaint at 1). Also on this date, Defendant Lester escorted Plaintiff to the Restricted Housing Unit Property Room to exchange his legal and religious materials (Complaint at 2). Plaintiff claims upon arriving in the back hallway of the RHD, or view of the RHD security cameras, Defendant Co. Lester shoved the Plaintiff into the concrete wall, face first and hit Plaintiff twice on the back of his head his lower back. (Complaint at 4) During the alleged assault, the Plaintiff handcuffed to a security belt secured around his waist. (Complaint at 5)

Plaintiff claims he suffered a bruise on his lower back and soreness on head as a result of such assault. (Complaint at 7) Plaintiff further claims that Defendant C. A. Lester threatened to assault him on several dates following August 23, 2000. (Complaint at 8)

### III. ARGUMENT

A. DEFENDANT'S MOTION FOR STAY OF PROCEEDINGS AND ENLARGEMENT OF TIME TO RESPOND TO PETITIONER'S PETITION FOR WRIT OF HABEAS CORPUS SHOULD BE DISMISSED BY THIS COURT WITHOUT CONSIDERATION OF THE MERITS THEREOF DUE TO VIOLATIONS OF FEDERAL RULES OF CIVIL PROCEDURE AND A LOCAL RULE OF THIS COURT AND OTHER IMPROPRIETIES.

First of all, Plaintiff avers & submits that Defendant's Motion For Stay of Proceedings And Enlargement of Time To Respond To Petitioner's Petition For Writ of Mandamus, herein, is improper and should be dismissed by this Court without consideration of the merits thereof because such violates Federal Rules of Civil Procedure, Rule 11 (a), which in relevant part states;

(a) Signature. Every pleading, written motion, and other papers shall be signed by at least one attorney of record in the attorney's individual name, . . . and Defendant C.O. Lester's Attorney of Record herein this case Sub Julia R. Dept. of Corrections, Office of the Chief Counsel, Assistant Counsel Victoria S. Freimuth, however, the ~~was~~ Assistant Counsel who signs Defendant's Motion For Stay of Proceedings And Enlargement of Time To Respond To Petitioner's Petition For Writ of Mandamus on August 16, 2001, is Assistant Counsel Michael J. McGovern, who is "not" Defendant's Counsel of Record herein case, and who should "not" have signed such Motion on behalf of the Defendant.

Second of all, Plaintiff avers & submits that Defendant's Motion For Stay of Proceedings ~~and~~ Enlargement of Time To Respond To Petitioner's Petition For Writ of Mandamus herein, is improper and should be dismissed by this Court without consideration of the merits thereof because such violates Federal Rules of Civil Procedure 11 (b) (3); which states;

All motions shall be signed in accordance with Rule 11. 9

and Defendant's Motion here is "not" signed in accordance with Rule 11 for the reasons as stated above.

Third of all, such Motion should be dismissed by this Court without consideration of the merits thereof because it does "not" state therein that Defendant's Attorney of Record, Assistant Counsel Victoria S. Freimuth, was sick or was



unavailable to sign such Motion in accordance with Fed. R. Civ. P. 11(a), nor does such motion state any other special circumstances nor reasons why she could not sign such motion and in fact, such motion fails to state anything as to why Assistant Counsel Michael J. McGovern signed such instead of Defendant's Attorney of Record Victoria S. Freimuth.

Fourth of all, Plaintiff avers & submits that, Defendant's Motion For Stay of Proceedings And Enlargement of Time To Respond To Petitioner's Petition For Writ of Mandamus, herein, is improper & should be dismissed by this Court without decision on the merits thereof because such was prepared, signed & filed in violation of M.D. LR 83.15 of this Court which states,

Appearance of counsel shall not be withdrawn except by leave of court. The court may refuse to approve withdrawal if counsel is superseded by new counsel, such new counsel shall enter an appearance and counsel who is superseded shall comply with this rule and apply for leave to withdraw from the action. The court may refuse to grant a motion for leave to withdraw unless substitute counsel has entered an appearance.

and herein this instant case, Assistant Counsel Michael J. McGovern states therein Defendant's Motion For Stay of Proceedings And Enlargement of Time To Respond to Petitioner's Petition For Writ of Mandamus, at 1, is by and through his Attorney, Michael J. McGovern, Assistant Counsel, Penn Department of Corrections, however, Michael J. McGovern is "not" Defendant's Attorney, as, Victoria S. Freimuth, is Defendant's Attorney, as neither Michael J. McGovern nor Victoria S. Freimuth have complied with the above-cited provisions of M.D. LR 83.15, in that, Michael J. McGovern has "not" entered an appearance and Victoria S. Freimuth, counsel who would be superseded, has "not" complied with the rule and applied for leave to withdraw from the action nor has this Court granted such leave, herein this case and only an attorney of record or a represented party may file any motion on the party's behalf by leave of court and disregard its own local rules, it cannot disregard the Fed. R. Civ. P.

Finally, the Plaintiff avers & submits that, Defendant's Motion For Stay of Proceedings And Enlargement of Time To Respond To Petitioner's Petition For Writ of Mandamus, herein, should be dismissed by this Court without

is improper, as such lists the parties to this civil action as being the "Petitioner" and "Respondent", when the parties are the "Plaintiff" and "Defendant" and the case number for this civil action is listed improper on such motion.

Based on the above foregoing facts & arguments, this Court shall deny the Defendant's Motion For Stay of Proceedings And Enlargement of Time to Respond to Petitioner's Petition For Writ of Mandamus with consideration thereof.

B. DEFENDANT'S MOTION FOR STAY OF PROCEEDINGS AND ENLARGEMENT OF TIME TO RESPOND TO PETITIONER'S PETITION FOR WRIT OF MANDAMUS IS SPECIOUS, FACTUALLY FRIVOLOUS AND UNTRUE AND SHOULD BE DENIED BY THIS COURT HEREIN.

Plaintiff avers & submits that, if this Court does not accept and grant the foregoing arguments, as by law, it shall, than it still deny Defendant's Motion For Stay of Proceedings And Enlargement of Time to Respond to Petitioner's Petition For Writ of Mandamus such "is" Specious, Factually Frivolous and Untrue, based upon the following:

Defendant claims that:

Respondent never received the above referenced Petition For Writ of Mandamus on brief.

Defendant also claims, that:

The Court's Order of August 6, 2001 was the first notice Respondent received of Petitioner's Petition.

Plaintiff does not at all, avers & submits that there is no Petitioner nor herein this case, only this Plaintiff and Defendant Lester and, second the facts and allegations of Defendant's Motion For Stay And Enlargement of Time to Respond to Petitioner's Petition For Writ of Mandamus, are, not than Defendant's Counsel's "lies" and such Petitioner's "lies" therefore is factually frivolous and untrue, as on June 26, 2001, this [redacted] "bld", Defendant's copy of such Petition, which this Plaintiff had given to them 2001, to Defendant's Counsel of Record, herein, at her address of record, herein, 2001.

such there is no reason why Defendant's Counsel should not have received her copy of such Petition For Writ of Mandamus And Brief In Support, here in this case and furthermore, by such, counsel is indicating that this Plaintiff is lying and this Plaintiff has been in prison now 14 yrs. He has received a MRS. and a Report for lying before he came to prison, his reputation for veracity was also. Defendant also claims that:

on June 28, 2001, Petitioner filed a Petition for Writ of Mandamus and brief in support thereof asking the Court to order officials at the State Correctional Institution at Greene (SCI-Greene) to return all legal materials, court files and law books to petitioner and to provide petitioner with paper, carbon paper and two legal envelopes. Petitioner attached a Certificate of Service to his Petition and brief affirming he served Respondent. 4)

Plaintiff also avers & submits, that the above-referenced statement of Defendant's Counsel "is" further proof that Defendant's Counsel did not receive a copy of such Petition, as how else would Defendant/Counsel know that this Petitioner attached a Certificate of Service to his Petition and brief affirming he served Respondent, as he does state and also how would he know what it is that this Petitioner asks this Court to order he states in Para. No. 1 of his Motion For Stay, et. al. If his counsel had received a copy of such Petition? Alternatively, if Defendant/Counsel obtained a copy of such Petition from the Court File in the Clerk's Office, his Motion For Stay of Proceedings And Enlargement of Time To Respond To Petitioner's Petition For Writ of Mandamus still should be denied as Defendant's Motion "is" moot, here in, as he "has" a copy of what he claims his Counsel was not served with by this Plaintiff, and whether he received a copy of Petition from this Plaintiff or from the Court or from the Clerk's Office, it is evident that he now has a copy of such & thus, Defendant's Motion For Stay of Proceedings And Enlargement of Time To Respond To Petitioner's Petition For Writ of Mandamus, here in, should be denied by this Court.

Finally, the Plaintiff avers & submits that, he has done all he could personally do here in to comply with the provisions of Fed. R. Civ. P. 5(b) and M.D. LR 7.2, on service, as he is a prisoner who is locked in the Special Management Unit of SCI-Greene and cannot get out of his cell and walk out to the prison mail room and personally hand Defendant's Motion For Stay of Proceedings And Enlargement of Time To Respond To



such Petition For Writ Of Mandamus And Brief In Support to the Prison  
Marlson Staff here and therefore, if in fact Defendant/Counsel are  
telling the truth therein Defendant's Motion For Stay Of Proceedings And  
Enlargement Of Time To Respond To Petitioner's Petition For Writ Of  
Mandamus and Defendant's Counsel <sup>actually</sup> did not receive a copy of the  
such as "not" the fault of this Plaintiff, as he'd "give" Prison  
Officials here a copy of such Petition to mail to Defendant's  
other Office address of record, on June 22, 2001, and in Holt  
v. Lott, 487 U.S. 266, 108 S.Ct. 2379 (1988), the U.S. Supreme Court held  
that a petition is deemed filed on the day it is given to prison officials for mail.

The Court reasoned that the litigant loses control over the matter as soon  
turning it over to prison personnel. Holt v. Lott, 487 U.S. 266, 275-76,  
108 S.Ct. 2379 (1988). The lower courts have generally applied this rule to other  
litigation deadlines as well. See Garvey v. Vaughn, 993 F.2d 776, 782-83 (11th Cir.  
1993); Simmons v. Galt, 970 F.2d 392, 393 (7th Cir. 1992); Dunn v. U.S.  
880 F.2d 1188, 1190 (10th Cir. 1989), cert. denied, 493 U.S. 1059 (1990) and Smith  
853 F.2d 155, 161-62 (3d Cir. 1988); and, herein this instant case, once  
Plaintiff turned over Defendant's Counsel's copy of the Petition For Writ  
Mandamus and Brief In Support to Prison Personnel here, he, Plaintiff,  
lost control over such copy of the Petition as soon as he did so.  
Thus, this Plaintiff should "not", by law, have to serve another  
copy of such Petition on Counsel for the Defendant, herein the  
and, besides this he does "not" have enough paper to prepare  
copy of such Petition to serve "again" on Defendant's Counsel.

Therefore, Defendant's Motion For Stay Of Proceedings And  
Of Time To Respond To Petitioner's Petition For Writ Of Mandamus  
law, be denied by this Court, herein this case.

(W) HEREBY, for the foregoing reasons & arguments, herein  
this Court should DISMISS the Defendant's Motion For Stay Of Proceedings  
Enlargement Of Time To Respond To Petitioner's Petition For Writ Of Man  
herein, without consideration of the merits thereof or, in the alternative shall  
such as merits.

(S) — MR. JOHN RICHARD JAMES

#30-3219  
att. [unclear]

Dated: 21st AUGUST 2001:

Judge vs. G. Q. Lester  
 CIVIL No. 1: CV - 01-00411

CERTIFICATE OF SERVICE

I certify that on 6-22-01, I mailed to the person listed,  
 a true and correct carbon copy of each of Plaintiff's  
 Petition For writ of mandamus and Brief In  
 Support and Motion For Enlargement  
 of time, by way of U.S. 1st class  
 Mail, postage prepaid and  
 addressed to:

Ms. Victoria S. Freeman,  
 Assistant Counsel  
 Office of the Chief Counsel  
 Federal Prison Dept. of Corrections  
 55 Valley Drive  
 Camp Hill, PA 17011

I certify that on 6/23/01, I gave to prison official in  
 mailing to this court, the originals of each of the above-named  
 documents.

I certify under penalty of perjury & pursuant to 28 U.S.C. § 1746,  
 the above, is true & correct.

Dated/Executed on:  
 22nd JUNE 2001  
 At: ULYNN 405 JURY/MAIL =

(S) John Richard  
 MR. JOHN RICHARD  
 #BQ-3319  
 ECI - Greenel/AMU  
 175 Progress Drive  
 Wayne, PA 15370  
 Plaintiff and Allse Court



DC-138A		COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF CORRECTIONS	
<b>CASH SLIP</b>			
<b>1. REQUISITIONING INMATE</b>			
INSTITUTIONAL NUMBER B & 3219	LOCATION 1B9	DATE 6/22/01	
<b>2. RECEIVING INMATE</b>			
INSTITUTIONAL NUMBER	LOCATION	DATE	
<b>3. ITEMS TO BE CHARGED TO MY ACCOUNT</b>			
<p>For postage, outgoing legal/court mail</p> <p>To: Ms. Victoria S. Freeman, Esq.          Assistant Counsel          Office of the Chief Counsel,          Pennsylvania Department of Corrections          55 Utley Drive          Camp Hill, PA 17011</p> <p style="text-align: center;">Hm          Left ONLY</p> <p style="text-align: center;">0</p>			
<b>4. INMATE'S SIGNATURE</b> John R. [Signature]		<b>5. OFFICIAL APPROVAL</b>	
<b>6. BUSINESS OFFICE'S SPACE</b>			
CHARGE ENTERED \$ 34	DATE 6-26	BOOKKEEPER [Signature]	

Plaintiff's Exhibit - B -